STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN ANDREWS,

Defendant-Appellant.

UNPUBLISHED
April 26, 2005

No. 255733
Wayne Circuit Court
LC No. 03-008590

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals by leave granted his convictions of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to imprisonment for seventeen months to twenty years for the possession with intent to deliver cocaine conviction, seventeen months to four years for the possession with intent to deliver marijuana conviction, and two years for the felony-firearm conviction. We affirm, but remand for resentencing.

Defendant first argues that the evidence is insufficient to establish that he possessed the cocaine, marijuana, and firearm that formed the bases for his convictions. We disagree.

This Court reviews de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The test for determining whether sufficient evidence has been presented to sustain a conviction is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

According to defendant, the evidence was insufficient to establish that he possessed cocaine or marijuana. The offenses of possession with intent to deliver cocaine and possession with intent to deliver marijuana both require proof that the defendant knowingly possessed a

controlled substance. *People v Wolfe*, 440 Mich 508, 517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); MCL 333.7401(2)(a)(iv); MCL 333.7401(2)(d)(iii). The term possession "'signifies dominion or right of control over the drug with knowledge of its presence and character.'" *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Wolfe, supra* at 519-520. Constructive possession, which may be sole or joint, is the right to exercise control over the drug coupled with knowledge of its presence. *Id.* at 520. "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Id.* "[S]ome additional connection between the defendant and the contraband must be shown." *Id.* Circumstantial evidence and reasonable inferences arising therefrom are sufficient to establish possession. *People v Hellenthal*, 186 Mich App 484, 486-487; 465 NW2d 329 (1990).

Defendant admitted at trial that he actually possessed "[t]hree to four nickels of marijuana." Defendant's own testimony therefore established that he actually possessed marijuana. Furthermore, even without defendant's admission at trial, other evidence established that defendant was in constructive possession of both cocaine and marijuana. The evidence established that the police, who were executing a search warrant for narcotics at the house in which defendant was present, observed defendant sitting on a couch in the living room. Defendant was the only person present in the living room. The police also observed narcotics paraphernalia, cocaine and marijuana on a coffee table that was in front of the couch on which defendant was sitting. The presence of the defendant in the same room as narcotics that are in plain view is evidence of possession. See, e.g., *Wolfe, supra* at 521; *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995); *People v Williams*, 188 Mich App 54, 57-58; 469 NW2d 4 (1991). We reject defendant's contention that the presence of two other individuals in the home destroys the link between the drugs and defendant and negates a finding of possession in this case. Even if the other individuals in the house were also in actual or constructive possession of the cocaine and marijuana, this would not preclude defendant from constructively possessing the drugs because more than one person can actually or constructively possess a controlled substance. *Wolfe, supra* at 520. Defendant's presence in the living room right near the narcotics that were present in plain view permits the inference that defendant exercised control over the drugs and was aware of their presence. See *id.* Therefore, under the totality of the circumstances, there was a sufficient nexus between defendant and the cocaine and marijuana, and the evidence established that defendant constructively possessed the cocaine and marijuana.

Defendant also argues that the evidence is insufficient to establish the possession element of felony-firearm. In order to be convicted of felony-firearm, the prosecutor must prove that a defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be actual or constructive and may be proved by circumstantial as well as direct evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989).

The evidence established that the police, during their execution of a search warrant for narcotics at the home in which defendant was present, observed a twelve-gauge shotgun on the floor near the couch where defendant was sitting. The shotgun was located within one foot of defendant's right foot. Defendant's access to the gun was not restricted by anything, such as the

coffee table or the couch. "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471. We find that the gun, which was located not more than one foot away from defendant's foot and which was readily obtainable by defendant, was reasonably accessible to defendant. Therefore, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to establish that defendant had constructive possession of the firearm during the commission of the felonies.

Defendant next argues that the trial court erred in instructing the jury on the possession element of felony-firearm. Specifically, defendant argues that the trial court's felony-firearm instruction failed to inform the jury that, in order to have constructive possession of the weapon, defendant must have demonstrated some indicia of control over the weapon.

We review de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *Id.* Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

Defendant concedes that he did not request an instruction that in order to have constructive possession of the weapon, defendant must have had an indicia of control over the weapon. Moreover, defendant expressed satisfaction with the instructions as given and did not object to the lack of the instruction he now argues should have been given. Defendant has therefore failed to preserve this claim of instructional error for review. MCR 2.516(C); *id.* With regard to unpreserved claims of instructional error, we review such claims for plain error that affected substantial rights. *Carines, supra* at 763; *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). In order to avoid forfeiture of an unpreserved issue, defendant must establish that an error occurred, that the error was plain, i.e., clear or obvious, and that the error affected defendant's substantial rights, i.e., affected the outcome of the trial court proceedings. *Carines, supra* at 763. We conclude that there was no plain error in this case.

The trial court's felony-firearm instruction was as follows:

> So, if you find that there was a felony committed in Count 1 or Count 2, and at the time of the commission of the felony that the defendant in this case had possession of a firearm.
>
> Now possession of a firearm does not mean that it was in his hands, but that it was—that he was in actual constructive possession, that it was in an area at the same time the possession was committed, that the firearm was in the same area where the felony was committed.
>
> So if you find that there was possession, a felony committed in Count 1 and Count 2, or Count 1 or Count 2, and at the time that there was a firearm present in the same area as where the illegal substance, then that would be Possession of a Firearm in the Commission of a Felony.

The trial court did not give the standard felony-firearm instruction in the Michigan Criminal Jury Instructions. CJI2d 11.34. However, these instructions do not have the official sanction of our Supreme Court, and their use is not required. *People v Gadomski*, 232 Mich App 24, 32 n 2; 592 NW2d 75 (1998). Our review of the trial court's felony-firearm instruction reveals that the instruction included the basic possession element contained in CJI2d 11.34, plus some additional instructions regarding constructive possession that CJI2d 11.34 does not contain. Moreover, we observe that the trial court correctly instructed the jury regarding constructive possession in the context of defendant's possession with intent to deliver cocaine and marijuana offenses. We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Viewing the jury instructions in their entirety, we find that they did fairly present the issues to be tried and sufficiently protect defendant's rights. Defendant has not established plain error regarding the trial court's felony-firearm instruction.

Defendant finally argues that he is entitled to resentencing because the trial court imposed a sentence outside the guidelines range for his possession with intent to deliver cocaine conviction without articulating substantial and compelling reasons for the departure. We agree with defendant, vacate his sentence for possession with intent to deliver cocaine, and remand for resentencing.

Because defendant's conviction of possession with intent to deliver less than fifty grams of cocaine occurred after January 1, 1999, the Legislative sentencing guidelines apply. MCL 769.34(2). Under the statutory sentencing guidelines, a departure is only allowed by the Legislature if there is "a substantial and compelling reason" for the departure and the sentencing court "states on the record the reasons for departure." MCL 769.34(3). A substantial and compelling reason for departure must be objective and verifiable, must be a reason that keenly or irresistibly grabs a court's attention, and must be of considerable worth in deciding the length of a sentence. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). Substantial and compelling reasons exist only in exceptional cases. *Id.*

A trial court is required to impose an "intermediate sanction" rather than a prison term if the upper limit of the minimum sentencing guidelines range is eighteen months or less unless the trial court "states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." MCL 769.34(4)(a). An intermediate sanction can include a jail term that does not exceed the upper limit of the recommended minimum sentence range or twelve months, whichever is less. *Id.* However, an intermediate sanction does not include a prison sentence. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). In this case, the minimum sentencing guidelines range for defendant's possession with intent to deliver cocaine conviction was zero to seventeen months. The trial court sentenced defendant to imprisonment for seventeen months to twenty years.[1] At first glance, this sentence, which did

[1] It is not clear that the trial court was aware that it was departing from the sentencing guidelines. The fact that defendant's minimum sentence was the highest end of the minimum guidelines range, coupled with the fact that the trial court failed to acknowledge the guidelines departure on the record, strongly suggests that the trial court believed that it was sentencing defendant within the guidelines range. Furthermore, in advising defendant of his rights concerning appeal, the

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not exceed the upper limit of the guidelines range, would not appear to be a departure. See *id.* at 634-635. However, because the upper limit of the minimum sentencing guidelines range was eighteen months or less, the trial court was required to impose an "intermediate sanction" or state on the record "a substantial and compelling reason" to sentence defendant to imprisonment. MCL 769.34(4)(a). Therefore, the trial court, in sentencing defendant to prison without articulating substantial and compelling reasons for doing so, violated MCL 769.34(4)(a).

On remand, if the trial court finds substantial and compelling reasons to warrant a prison sentence, it must articulate those reasons on the record. If it does not, the trial court must impose an intermediate sanction, which may include a jail sentence of not more than twelve months.

Defendant also argues that the trial court erred in failing to prepare a sentencing information report (SIR) and calculate a minimum guidelines range for his possession with intent to deliver marijuana conviction. Where a single offender is convicted of multiple offenses and the sentences will be served concurrently, an SIR must be prepared only for the offense in the highest crime class. MCL 777.21(2); MCL 771.14(2)(e). Because the trial court ordered defendant's possession with intent to deliver cocaine and marijuana sentences to run concurrently, and an SIR was completed for the possession with intent to deliver cocaine conviction, which was the offense in the highest crime class, the court need not have completed an SIR for the possession with intent to deliver marijuana conviction.[2] Nevertheless, to the extent that defendant's seventeen month sentence for his possession with intent to deliver marijuana conviction was concurrent with and hinged on the validity of the seventeen month sentence for possession with intent to deliver cocaine, we remand for resentencing. We advise the trial court that on remand, while it need not complete an SIR for this offense if it again orders the sentences to run concurrently, the sentence must comply with MCL 769.34(4)(a).[3]

We affirm defendant's convictions, but remand for resentencing of defendant's possession with intent to deliver cocaine and marijuana convictions.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello

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trial court failed to advise defendant that he could appeal on the grounds that his sentence was longer or more severe than the appropriate sentence range as required by MCL 769.34(7).

[2] Possession with intent to deliver less than fifty grams of cocaine is a Class D offense, while possession with intent to deliver less than five kilograms of marijuana is a Class F offense. MCL 777.13.

[3] The trial court had discretion to order defendant's sentences for possession with intent to deliver cocaine and possession with intent to deliver marijuana to run consecutively. MCL 333.7401(3). If, on remand, the trial court elects to order the sentences to run consecutively, then the trial court must also prepare an SIR for the possession with intent to deliver marijuana conviction. MCL 771.14(2)(e).